This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1430

Eligio Rodriguez Cerrito, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed May 9, 2022
Affirmed
Segal, Chief Judge

Hennepin County District Court
File No. 27-CR-16-28166

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Segal, Chief Judge; Smith, Tracy M., Judge; and Hooten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this appeal from the district court's order denying his petition for postconviction relief, appellant argues that he is entitled to a new trial because the prosecutor committed misconduct by inflaming the passions of the jury. We affirm.

FACTS

In October 2016, K.Z. (the child) disclosed to a school social worker that a man staying with her family was hurting her. The man, appellant Eligio Rodriguez Cerrito, moved in with the child and her family around 2012. Rodriguez[1] stayed in a ground floor bedroom, and the child, her mother, and her brothers slept upstairs. The child and mother shared a bedroom. Mother left the home early in the morning to go to work, before the children left to go to school.

In her disclosure to the school social worker, the child stated that one morning, after her mother left for work, Rodriguez went into her bedroom, got in bed with her, and "started cuddling with her." She also reported that Rodriguez had put his hands under her shirt and pulled down her pants and touched her vaginal area. The school social worker immediately made a mandated report about the child's allegations, and law enforcement and child-protection services referred the child to CornerHouse for an interview.

[1] During the district court proceedings, appellant stated that he preferred to be called Rodriguez, rather than Rodriguez Cerrito. We will therefore refer to him by his preferred name.

The forensic-services director for CornerHouse conducted a forensic interview the same day. During the interview, the child stated that, in the morning after mother left for work, Rodriguez had repeatedly gone into her room and "tr[ied] to cuddle with" her. The child, who was 14 at the time of the interview, reported that this behavior started when she was 12 or 13 years old. The interviewer asked the child to describe in detail what happened, and the child stated that Rodriguez would touch her stomach and thighs and that it felt like he was "trying to reach up to [her] vagina." The child stated that on one occasion, Rodriguez "rub[bed]" outside her vagina and that she "felt like he was trying to go through inside." She also stated that on another occasion Rodriguez went into her room while she was sleeping, pulled down her bottoms and his pants, and she "felt something" and thought "he was like trying to put [his penis] in [her butt]." During the interview, the child used anatomical dolls to show where Rodriguez had touched her.

An investigator with the Minneapolis Police Department interviewed Rodriguez. Rodriguez acknowledged that one of the child's brothers saw Rodriguez hugging the child in the hallway and on the bed in the child's bedroom. Rodriguez admitted that the child's mother asked Rodriguez to stop going into the child's bedroom, but that he continued to do so.

Respondent State of Minnesota charged Rodriguez with two counts of first-degree criminal sexual conduct and three counts of second-degree criminal sexual conduct. The district court held a jury trial starting in late March 2019. The state dismissed one count of first-degree criminal sexual conduct, and the jury found Rodriguez guilty of the remaining four counts. The jury also completed a special-verdict form on aggravating

factors for sentencing and determined that three of the four offenses occurred in the child's bedroom, and therefore within her zone of privacy, and that Rodriguez was in a position of authority over the child when all the offenses occurred. The district court sentenced Rodriguez to an upward durational departure of 190 months in prison for first-degree criminal sexual conduct.

Rodriguez filed a petition for postconviction relief, in which he asserted that he was entitled to a new trial because the prosecutor committed misconduct, the evidence was insufficient to support one of his convictions for second-degree criminal sexual conduct, and he was entitled to be resentenced because it was improper for the district court to consider his position of authority over the child as an aggravating factor. The district court denied the petition based on its determinations that (1) the prosecutor committed misconduct that amounted to plain error but that the error did not affect Rodriguez's substantial rights, (2) Rodriguez could not seek postconviction relief relating to the second-degree criminal-sexual-conduct charge because no conviction was formally entered on that charge, and (3) it was improper to use Rodriguez's position of authority as an aggravating factor for sentencing but that the upward departure was sufficiently supported by the zone-of-privacy factor. Rodriguez now appeals the ruling that the prosecutorial misconduct did not affect his substantial rights. He did not appeal the other rulings.

DECISION

This court reviews the denial of a petition for postconviction relief for an abuse of discretion. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). An abuse of discretion occurs when a district court's "decision is based on an erroneous view of the law or is

against logic and the facts in the record." *Id*. (quotation omitted). We review legal issues de novo, but our review of factual issues is limited to whether there is sufficient evidence in the record to sustain the postconviction court's findings. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015).

Rodriguez argues that he is entitled to a new trial because of the prosecutor's misconduct in her closing argument. Because Rodriguez did not object at trial, this court applies a modified plain-error test to review his claims of misconduct. *State v. Peltier*, 874 N.W.2d 792, 803 (Minn. 2016). Under this test, the defendant must first demonstrate "that the prosecutor's conduct constitutes an error that is plain." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The burden then shifts to the state "to demonstrate lack of prejudice," *id.*, or in other words, "that the plain error *did not* affect the defendant's substantial rights," *State v. Epps*, 964 N.W.2d 419, 423 (Minn. 2021). An error is plain when "it was clear or obvious," which is generally established when "the error contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302 (quotations omitted). "As a general rule, [appellate courts] reverse only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *Francis v. State*, 729 N.W.2d 584, 590 (Minn. 2007).

"[A] prosecutor may not seek a conviction at any price" and "must avoid inflaming the jury's passions and prejudices against the defendant." *State v. Porter*, 526 N.W.2d 359, 362-63 (Minn. 1995). "When credibility is a central issue, [appellate courts] pay[] special attention to statements that may inflame or prejudice the jury." *State v. Mayhorn*, 720 N.W.2d 776, 787 (Minn. 2006). A closing argument must be based on the evidence

presented at trial. *Porter*, 526 N.W.2d at 363-64. And it must not urge the "jury to protect society" through its verdict. *State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000), *rev. denied* (Minn. May 16, 2000).

Rodriguez argues that the prosecutor "inflamed" the emotions of the jury against him and "asked jurors to help solve the community's problem with child sexual abuse by urging jurors to believe" the child. He argues that this amounts to plain error entitling him to a new trial. His argument focuses on the following portion of the prosecutor's closing argument:

> Children speak softly so we have to listen. We have to listen because the adult men who victimize them are counting upon their silence. That is why children are targeted. Adults who victimize children do so because they think they can get away with it, that no one will believe the child.
>
> Children don't present with a sequential or linear discussion of what happened to them and what happened to their bodies. She's confused, she's making it up. Children are the perfect target. They don't have enough life experience to understand what's happening to them in the moment. That is why they are targeted, especially when they're in a vulnerable position.
>
> Children are often told someone hurts you, tell someone. If someone touches you inappropriately, tell someone. In the 11th hour don't overlook [the child]. Don't ignore her, dismiss her, she told you what happened to her and what the defendant did to her.

The district court determined that these statements amounted to plain error. In doing so, the district court acknowledged that this court has recently reviewed nearly identical closing arguments in a number of other cases and determined that the arguments constituted

plain error.[2] In those cases, this court consistently found that the prosecutor went beyond the evidence presented at trial and impermissibly injected the societal need to protect children from sexual abuse into the argument.[3] While these cases are not binding precedent, they may be cited for their persuasive value. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c).

Here, the prosecutor went beyond the evidence presented at trial and spoke about children generally who are the victims of sexual abuse, rather than focusing on the child in this case. The prosecutor's argument was not limited to the child's testimony and allegations, but broadly referenced children who are sexually abused, why "men who victimize them" target children, why "[c]hildren are the perfect target," and why "we have to listen" when children speak. In doing so, the prosecutor impermissibly injected into the closing argument the need for society to protect children. *See Duncan*, 608 N.W.2d at 556. Accordingly, we agree with the district court and prior opinions of this court that the closing argument constitutes plain error.

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[2] *See State v. Galvan-Tirado*, No. A21-0486, 2022 WL 898021, at *3-4 (Minn. App. Mar. 28, 2022), *petition for rev. filed* (Minn. Apr. 15, 2022); *Dowell v. State*, No. A20-1069, 2021 WL 1846830, at *3-4 (Minn. App. May 10, 2021), *rev. denied* (Minn. Aug. 10, 2021); *State v. Rosendo Dominguez*, No. A19-0869, 2020 WL 3637928, at *2-3 (Minn. App. July 6, 2020), *rev. denied* (Minn. Sept. 29, 2020); *Garcia v. State*, No. A18-1907, 2019 WL 3545814, at *2-4 (Minn. App. Aug. 5, 2019), *rev. denied* (Minn. Oct. 29, 2019); *State v. Danquah*, No. A18-1581, 2019 WL 3293790, at *4-6 (Minn. App. July 22, 2019), *rev. denied* (Minn. Oct. 15, 2019); *State v. Ciriaco-Martinez*, No. A18-1415, 2019 WL 2999783, at *2 (Minn. App. July 1, 2019).

[3] We note that the prosecutor made the closing argument before the release of any of the opinions cited in the preceding footnote. The state mentions in its brief that prosecutors have since been provided training based on those opinions. Nevertheless, we reiterate, unequivocally, that this portion of the closing argument is impermissible.

Because Rodriguez has demonstrated that plain error occurred, we must next consider whether the state has met its burden of establishing that the error did not affect Rodriguez's substantial rights. When deciding whether the state has met this burden, appellate courts consider (1) the strength of the evidence against the defendant, (2) the pervasiveness of the misconduct, and (3) whether the defendant had the opportunity, or made efforts, to rebut the prosecutor's improper suggestions. *State v. Hill*, 801 N.W.2d 646, 654-55 (Minn. 2011). The district court analyzed these factors and determined that the error did not affect Rodriguez's substantial rights "[b]ecause the evidence presented by the State was sufficiently strong, the improper statements were not pervasive, the [d]efense had the opportunity to respond, and the court's instructions to the jury lessened the impact of the statements."

Rodriguez argues that the district court erred in determining that the prosecutorial misconduct did not affect his substantial rights. He acknowledges that the record supports the district court's determinations that the misconduct was not pervasive, the defense had the opportunity to respond to the improper argument, and the district court gave general cautionary instructions, but argues he is still entitled to relief because the evidence against him was not strong.

The district court entered a conviction and sentenced Rodriguez for the most serious charge—first-degree criminal sexual conduct. The statutory section under which Rodriguez was convicted provides that "[a] person who engages in sexual penetration with another person . . . is guilty of criminal sexual conduct in the first degree if . . . the actor has a significant relationship to the complainant and the complainant was under 16 years

of age at the time of the sexual penetration." Minn. Stat. § 609.342, subd. 1(g) (2012). "Sexual penetration" includes "any intrusion however slight into the genital or anal openings . . . of the complainant's body by any part of the actor's body." Minn. Stat. § 609.341, subd. 12(2)(i) (2012).

Rodriguez argues that the state's evidence that he engaged in sexual penetration "was anything but strong." The state maintains that "there was strong evidence of both" genital and anal penetration.[4] We note, however, that the evidence of anal penetration is, at a minimum confusing, which impacts its strength. The child did testify at trial that Rodriguez "wouldn't like put it in but he would like put it in farther" about the incident in which Rodriguez tried "to put his penis in [her] butt." She also stated during both the CornerHouse interview and her testimony at trial that Rodriguez's penis did not penetrate her anal opening, that Rodriguez "would just touch my butt cheeks and that's all." Thus, contrary to the state's assertion, the evidence of an "intrusion . . . into the . . . anal opening[]," Minn. Stat. § 609.341, subd. 12(2)(i), is not strong.

The evidence of vaginal penetration is stronger. The forensic interviewer testified at trial that, when the child used the anatomical dolls to demonstrate the incident during the interview, the child "did clarify that [Rodriguez's] fingers went in between kind of the lips of [the child's] vulva." The exact placement of the dolls is obscured in the video of

[4] At trial, the state argued that it "only ha[d] to prove one act of sexual penetration" to support the first-degree criminal-sexual-conduct charge, and that the jury could "choose" between "two incidents of penetration" because both anal and vaginal penetration occurred. The jury found Rodriguez guilty of the charge, but the verdict form does not specify whether the jury found that only one or both forms of penetration occurred.

the CornerHouse interview, but the interviewer's testimony describing the child's demonstration with the dolls is consistent with the child's statement during the CornerHouse interview that Rodriguez put his hands "in between" her vagina and that it "felt weird." This evidence supports the state's claim of vaginal penetration.

Rodriquez also argues that the fact the jury asked to review the CornerHouse video while deliberating demonstrates that the evidence was not strong. We cannot read such a significant inference into the jury's request. We thus conclude that the evidence, at least with respect to vaginal penetration, was sufficiently strong, particularly when viewed in the context of the other factors of the modified plain-error test.

Turning to the questions of pervasiveness and the defense's opportunity to rebut the alleged misconduct, Rodriguez acknowledges, as noted above, that the misconduct was not pervasive and that the defense had the opportunity to rebut the improper argument. The erroneous statements spanned three paragraphs of a 13-page transcript of the state's closing argument. The challenged statements were included at the start of the prosecutor's closing argument and were not repeated or referenced again for the balance of the prosecutor's argument or in the rebuttal. In addition, the district court instructed the jury that the statements made by the attorneys during closing arguments were not evidence and that the jury was to "[d]eliberate without prejudice, bias or sympathy, and without regard to your own personal likes or dislikes." *See State v. Hawkins*, 511 N.W.2d 9, 13 (Minn. 1994) (noting that the instruction that closing arguments are not evidence "lessened the impact of the improper comments"). On this record, the district court did not err when it determined

that the prosecutorial misconduct did not affect Rodriguez's substantial rights and thus denied Rodriguez's petition seeking a new trial.

Finally, Rodriguez submitted a pro se supplemental brief. In the brief, Rodriguez generally asserts that the evidence was insufficient and inconsistent, and that "he has evidence to prove" that he was not at the house on several of the dates that were mentioned during the trial.[5] The arguments are unsupported by legal authority or analysis and are therefore waived. *See State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015) (observing that arguments based on mere assertion and unsupported by argument or authority are waived on appeal).

Affirmed.

[5] Rodriguez also argues that the school social worker "was allowed to be on the jury when he was part of the people who accused [Rodriguez]." The school social worker testified at trial; he was not a member of the jury.